In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1577

GORDON R. KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-28) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1973. The petition for a writ of certiorari was filed on May 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

QUESTION PRESENTED

Whether a search of an apartment with a warrant was invalid because based on evidence observed by police officers during a prior entry into the premises, with an arrest warrant, in search of a dangerous felon, or because of the manner in which the officers gained entrance when the search warrant was executed.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing two unregistered hand grenades, in violation of 26 U.S.C. 5861(d), and was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. 27-28).

The evidence adduced at trial and at a pretrial hearing on petitioner's motion to suppress showed that on February 25, 1972, a bank in Arlington, Virginia was robbed. State police investigating the robbery determined that it had been committed by one George Garland, who had been residing under an assumed name at a motel (H. 23-25).[1] Further investigation revealed that Garland had made several calls from the motel to an apartment leased to Mrs. Pamela Worrall, located at 5001 Seminary Road, Alexandria, Virginia; that one call had been made immediately after the robbery; that Garland might have been staying at the Worrall apartment; and that on the day after the robbery Mrs. Worrall was overheard commenting that her friend, Garland, had committed a bank robbery (H. 26-27). In addition, Garland's car was located in the parking lot of the apartment house (H. 32-33, T. 37).

On February 29, local and federal officers, armed with a warrant for Garland's arrest, went to the office of the resident manager of Mrs. Worrall's apartment building. After learning that Garland had recently been

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[1] "H." refers to the transcript of the pretrial hearing, with the exception of the separately paginated transcript of testimony by detective John W. Turner ("T."). "Tr." refers to the transcript of trial. A copy of each of these is being lodged with the Clerk of this Court.

seen in the building (T. 10), the officers attempted to execute the warrant. Although they believed that Garland would not answer telephones or respond to knocks on the door, the officers nevertheless first telephoned the apartment from the resident manager's office. Receiving no answer, the officers went upstairs and knocked on the door of Mrs. Worrall's apartment for several minutes. Again there was no response (H. 28-31). They then used a pass key to open the door. While searching for Garland, Alexandria detective John Turner saw in plain view on top of a kitchen cupboard a large and unusual smoking pipe. On closer inspection of the pipe, detective Turner found marijuana residue in the pipe bowl and marijuana stems and seeds in a dish beside the pipe (T. 15-16, 19). No one was found in the apartment. The pipe and marijuana were left behind, and a piece of cellophane tape was attached to the door and door frame in a manner designed to give evidence of any entry into the apartment (T. 24).

For the next several days, detective Turner and other local officers with him made daily checks of the apartment, and found the tape on the door apparently intact when they passed by (T. 25-26). In fact, however, between February 29 and March 6 the door had been opened several times. During this period, Mrs. Worrall and Garland were vacationing in Florida (Tr. 237, 255). Both petitioner, who paid the apartment rent and a $100 weekly allowance to Mrs. Worrall (Tr. 231-232), and the latter's sister, Mrs. Malinal Williford, had keys to the apartment and had visited the apartment during the week prior to March 6, 1972.

On March 6, at about 1:00 p.m., Mrs. Williford met petitioner at the apartment for the purpose of receiving

$320 to be wired by her to her sister in Florida (Tr. 293). She left at approximately 2:30 p.m. and, at 4:00 p.m., telephoned the apartment to inform petitioner that the money had been sent (Tr. 294).

Earlier that same day, detectives Turner and Roy Nash submitted their affidavit (Pet. App. 19-21) to a local justice of the peace, who thereafter issued a warrant authorizing them to search Mrs. Worrall's apartment. At approximately 4:30 p.m., several Alexandria police officers, including Turner and Nash, attempted to execute the warrant. They knocked on the door for several minutes and received no response (T. 27-28). Then a pass key was inserted into the door lock by the resident manager, and the door opened slightly; an inside chain latch prevented the door from opening further. Petitioner was observed on the living room sofa. He asked who was there, and Turner replied, "Police officers, open the door" (T. 29). Petitioner complied. He was then informed of the warrant, and the search of the apartment ensued (T. 38-39). Two live hand grenades were discovered in the living room closet wrapped in a towel inside a paper bag (H. 29-30; Tr. 197-198).

The following day, petitioner met Mrs. Williford outside the apartment building and informed her of the police search. Petitioner said, "I'm really worried. I had those grenades up there. They took the grenades I had up there" (Tr. 295). Two days later, when Mrs. Williford informed petitioner that the police intended to interview her, petitioner gave her a telephone number where he could be reached and said, "Don't say anything. You don't even know me" (Tr. 300-301).

In his defense, petitioner admitted his association with Mrs. Worrall and his free access to her apartment bu

denied keeping any personal possessions in her apartment other than more than $60,000 found there in the course of the search. Petitioner claimed that he never opened the living room closet and denied knowing that the grenades were there (Tr. 356-383). In rebuttal, a police detective testified that in response to police questioning after his arrest, petitioner denied having an apartment key, knowing who resided there, or owning the $60,000. Petitioner told the police officer that he had been admitted to the apartment by an unknown friend (Tr. 397-399).

ARGUMENT

Petitioner maintains that the February 29 entry into the apartment in search of Garland was illegal because there was no probable cause to believe Garland was there, that the discovery at that time of the marijuana atop a cupboard shelf was not lawful under the plain view doctrine, and that the March 6 search disclosing the hand grenades was invalid because it was based upon the prior allegedly illegal entry and because the police had failed to make their purpose known before entering the premises. None of these claims has merit. The police acted reasonably and pursuant to valid warrants in all phases of the investigation.

1. The information known to the police about Garland, the bank robber, when they made their entry into Mrs. Worrall's apartment on February 29 was sufficient to provide a reasonable basis to believe that Garland may have been inside. That information, obtained from police investigation and reports of informants, included knowledge that Garland had made several recent telephone calls to the apartment; that the resident manager of the apartment building had recognized

Garland's photograph and had stated that she had see him in the building "recently" (T. 10); that Garland' automobile had been found on the parking lot of th apartment house; that Garland was supposedly stayin in the area of the apartment building; and that Pamel Worrall had been heard to state that Garland, he "friend," had robbed a bank. Because ample caus existed for the police officers to believe that Garlan was in Mrs. Worrall's apartment, their entry therei was lawful. See *Warden* v. *Hayden,* 387 U.S. 29 *United States* v. *Price,* 345 F. 2d 256, 259 (C.A. 2 *United States* v. *Sims,* 231 F. Supp. 251, 254 (D. Md.)

2. Having made a lawful entry into the apartmen without encountering anyone, the police officers acte reasonably in making a search of the premises for th felon. *Warden* v. *Hayden, supra.* When, in the cours of that search, a police detective with narcotic experience observed a unique smoking pipe in plai view atop a kitchen cupboard, his conduct in returnin to the kitchen to examine the pipe after the fruitles search for the felon had been completed cannot fairl be deemed to be unreasonable. Detective Turner actions fall well within the plain view doctrine, whic "has been applied where a police officer is not searchin for evidence against the accused, but nonetheless i advertently comes across an incriminating object *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466.

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[2]*United States* v. *Watson,* 307 F. Supp. 173 (D.D.C.), relie upon by petitioner (Pet. 10), is not in conflict with the governmen argument. In *Watson,* Judge Gasch ruled that officers with a arrest warrant should not have entered an apartment when th had no reason to believe anyone was inside. However, Jud Gasch agreed that entry is lawful if a policeman "has reasonab cause to believe the defendant is within" (*id.* at 175).

Recognizing that the initial observation of the unusual smoking pipe would be deemed inadvertent, petitioner claims nevertheless that the officer had no right to examine it when it was out of his reach on top of the cupboard, and that detective Turner's discovery of the marijuana by climbing on the counter to lift the pipe down was therefore unlawful (Pet. 14). Contrary to that contention, the plain view doctrine has never been so restricted as to forbid a closer inspection of an incriminating object found in plain view. See *United States* v. *Drew*, 451 F. 2d 230 (C.A. 5).

3. The affidavit submitted by detectives Turner and Nash supporting the warrant issued on March 6 to search Mrs. Worrall's apartment for narcotics contained information regarding the pursuit of George Garland to this apartment, the entry on February 29 and discovery of the smoking pipe and marijuana, and the use of cellophane tape on the door and door frame, coupled with daily checks of the door which gave the detectives reason to believe that no one had entered the apartment since February 29 (Pet. App. 19-21). Certainly those averments, based largely upon the personal activities of the affiants, furnished probable cause for a detached judicial officer to issue a warrant. The information was not, as petitioner alleges, "stale" (Pet. 6) because the events had occurred six days before, particularly in light of the statements that the officers had strong reason to believe that no one had entered the premises since they had last observed the contraband. See *United States* v. *Guinn*, 454 F. 2d 29, 36 (C.A. 5), certiorari denied, 407 U.S. 911; *Coury* v. *United States*, 426 F. 2d 1354 (C.A. 6). The fact that this information proved to be erroneous because of circumstances unknown to the affiants (T. 23-26) did

not affect the integrity of the affidavit or negate the validity of its issuance. *Rugendorf* v. *United States*, 376 U.S. 528, 532.

4. Although they evidently expected the apartment to be unoccupied on March 6, the policemen knocked on the door for several minutes before attempting to gain entrance with a pass key. When the lack of any response to their knocking had indicated that no one was inside, the officers could rightfully expect that any announcement would serve as a useless gesture. *United States* v. *Hawkins*, 243 F. Supp. 429 (E.D. Tenn.); *United States* v. *Watson*, 307 F. Supp. 173, 176, n. 2 (D.D.C.); cf. *United States* v. *Gervato*, 340 F. Supp. 454 (E.D. Pa.). When they unexpectedly found the entrance barred from within by a chain latch, the police officers properly made no further attempt to enter on their own. They instead identified themselves, waited for petitioner to unlock the door, and presented him with a copy of the search warrant before beginning their search. That conduct cannot fairly be deemed unreasonable or violative of petitioner's right to privacy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1973.

DOJ-1973-07